IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-77,879-03

EX PARTE JASON MARK HUTCHINS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. B09-157
IN THE 198TH DISTRICT COURT FROM KERR COUNTY

***Per curiam*.**

O R D E R

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for writs of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of manufacturing methamphetamine, possessing chemicals to manufacture methamphetamine, and endangering a child. He was sentenced to concurrent terms of twenty years' incarceration for each offense in accordance with plea agreements that disposed of the cases together. There were no direct appeals. All three habeas applications remain pending before this Court and were previously remanded to the trial court for further information and affidavits, which have been provided.

This Court has conducted an independent review of the habeas records and all of Applicant's claims in his three habeas applications. Based on this review, this Court concludes that Applicant has not demonstrated entitlement to habeas corpus relief except for, perhaps, his claim that his twenty-year sentence for endangering a child is not authorized by law. This issue is remanded to the trial court for further information.

Applicant alleges that his twenty-year sentence in the child endangerment case is unlawful because the offense is a state-jail felony but he is being punished as though it were a second-degree felony. The offense appears to have been charged as a state-jail felony, and the indictment did not plead any enhancement paragraphs. A *Brooks* notice, however, is provided in the habeas record on second remand. *See Brooks v. State*, 957 S.W.2d 30 (Tex. Crim. App. 1997). It alleged several prior convictions for purposes of enhancing the applicable punishment range: (1) Burglary of a Building, which appears to have been a state-jail felony with punishment enhanced to that of a second-degree felony, becoming final on October 23, 1998; (2) Prescription Fraud, which appears to have been a state-jail felony that became final on October 23, 1998; and (3) Unlawful Possession of a Firearm by a Felon, which appears to have been a third-degree felony that became final, like the other two prior convictions, on October 23, 1998.

Using the *Brooks* notice, it appears that the punishment range for the state-jail felony child-endangerment offense was initially raised to that of a third-degree felony because Applicant had previously been finally convicted of two state-jail felonies—burglary of a building and prescription fraud. TEX. PENAL CODE § 12.42(a)(1). It then appears the punishment range was enhanced again to that of a second-degree felony under Section 12.42(a)(3) of the Penal Code using the prior third-degree firearm conviction. This sort of additional enhancement has been determined to be improper

because the underlying child endangerment offense remains a state-jail felony, albeit with an enhanced punishment under 12.42(a)(1), and the enhancement provision in 12.42(a)(3) can be applied only to third-degree felonies or to certain state-jail felonies not applicable to this case. TEX. PENAL CODE § 12.42(a)(3); *State v. Webb*, 12 S.W.3d 808 (Tex. Crim. App. 2000). So, based on the information before this Court, it appears that the twenty-year sentence imposed for the child endangerment offense is not authorized by statute because the offense appears to have been punishable as a third-degree felony.

The trial court shall provide this Court with further information and make factual findings regarding whether the child endangerment offense was properly enhanced to a second-degree felony, and, assuming the enhancement was not proper, the trial court shall provide this Court with information regarding and make factual findings whether any other convictions existed at the time of the prosecution that could have been used to properly enhance the punishment to a second-degree felony. *See Ex Parte Parrott*, 396 S.W.3d 531 (Tex. Crim. App. 2013). The trial court shall also make a recommendation to this Court, assuming the child endangerment sentence is not authorized by statute, whether only the endangerment conviction should be set aside and Applicant returned to answer that indictment or whether the convictions in all three cases should be set aside and Applicant returned to answer all the indictments because the pleas in the three cases were disposed of together under a "package" plea agreement. *See Ervin v. State*, 991 S.W.2d 801, 817 (Tex. Crim. App. 1999).

To provide this Court with the information discussed above, the trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d). In addition to the findings discussed above, the trial court may make any other findings it deems relevant and appropriate. If the trial court elects to hold a hearing, it shall determine whether Applicant is indigent. If Applicant is indigent and

wishes to be represented by counsel, the trial court shall appoint an attorney to represent him. TEX. CODE CRIM. PROC. art. 26.04.

These applications will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law and the supplements to the writ record discussed above, shall be forwarded to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: February 5, 2014
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